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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Nos. 731 and 732

RAYMOND W. STARR, Attorney General, in the name of and on behalf of the People of the State of Michigan,

Petitioner,

vs.

B. C. SCHRAM, Receiver of the First National Bank-Detroit, a National Banking Association,

Respondent.

BRIEF ON BEHALF OF RESPONDENT, B. C. SCHRAM RECEIVER, FIRST NATIONAL BANK-DETROIT, IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

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I

RESPONDENT'S SUMMARY STATEMENT OF FACTS

The First National Bank-Detroit closed its doors on February 11, 1933, and never thereafter resumed a normal banking business. The respondent is the present Receiver for said bank, having been appointed as such by the Comptroller of the Currency of the United States. At the time the bank closed, there were approximately 700,000 depositors therein. (R. 45-47)

In accordance with the provisions of the National Bank Act (Section 193, Title 12 U.S.C.; app. 76-77), the Receiver forthwith published a notice calling on all persons having claims against the bank to present the same and make legal proof thereof. The great bulk of the depos-

itors of the bank promptly complied with this notice, but there were approximately 123,000 small accounts, averaging $9.00 or less, which had been inactive and dormant for a number of years, for which claimants failed to appear. (R. 47-49)

The State of Michigan sought some means of obtaining these unproven accounts for its Primary School Fund. There were, however, no statutes in effect at the time of the closing of the First National Bank-Detroit which would have enabled the State of Michigan to proceed against these inactive accounts in the manner proposed herein by the petitioner. Under the laws in effect on February 11, 1933,* it was required in order that deposit balances, which had been inactive for seven years or more, to be escheated to the State:

a. That there be a proper showing by the State of Michigan that there was good cause to believe that the depositor in question was missing or dead.

b. That such depositor died intestate, possessing property, and leaving no heirs.

c. That the estate of such a depositor be administered as that of a deceased person.

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* Act 151 of the Public Acts of Michigan for 1846, contained in Section 13454 of the Compiled Laws of Michigan for 1929. (app. 21)

Act 238 of the Public Acts of Michigan for 1897, contained in Sections 13455 to 13477, inclusive, of the Compiled Laws of Michigan for 1929. (app. 21-35)

Act 205 of the Public Acts of Michigan for 1925, contained in Sections 15624 to 15653, inclusive, of the Compiled Laws of Michigan for 1929. (app. 35-50)

The State of Michigan, however, apparently was desirous of reaching the inactive deposit balances above described (averaging $9.00 or less) without the necessity or trouble and expense of complying with the orthodox escheat statutes then in effect. Accordingly, two bills were passed by the Michigan Legislature after the First National Bank-Detroit closed its doors.

On ~~August~~ April 6, 1933, two months after the First National Bank-Detroit closed, a special act of the Legislature known as Act 45 of the Public Acts of Michigan for 1933 (Section 13464-1 et seq., Mich. Comp. Laws for 1929, as amended; app. 50-52), was enacted, to take effect immediately. Among other things, Section 10a thereof provided that it should be sufficient proof, for the purpose of escheating dormant deposit balances, that there were no withdrawals from, or deposits to, said accounts for a period of seven years. No proof was required either that the depositor was missing or dead or that he died intestate and left no heirs.

Shortly thereafter, on June 28, 1933, another special act was passed, known as Act 171 of the Public Acts of Michigan for 1933 (Section 13463-1 et seq., Mich. Comp. Laws for 1929, as amended; app. 52-56), in which it attempted to invoke what seems to be a clear [redacted] forfeiture proceeding with respect to dormant deposit accounts in closed banks in Michigan. In an early decision rendered on November 17, 1933, the Circuit Court for Oakland County, Michigan, held Act 171 in violation of the Michigan Constitution. The State of Michigan took no appeal from this decision. For the convenience of the Court, we are setting forth a copy of said unreported opinion in the

appendix hereto, said case being entitled *Rudolph E. Reichert, Commissioner of Banking of the State of Michigan v. Peoples State Trust and Savings Bank of Pontiac.* (app. 16-20) This unappealed decision of an intermediate Michigan court holding Act 171, *supra,* to be unconstitutional is binding on the Federal Courts. *Stoner v. New York Life Insurance Company,* 311 U.S. 464 (1940).

[redacted]

After the Court of Appeals had decided adversely to the petitioner in these very proceedings, and while the Attorney General's petition for a rehearing in that Court was pending, the Michigan Legislature enacted still another escheat law, known as Act 170 of the Public Acts of Michigan for 1941 (Section 13458-1 et seq., Mich. Comp. Laws for 1929, as amended; app. 57-74), which Act was signed by the Governor of Michigan on June 16, 1941, and declared immediately effective. This new statute sought to establish a completely revised code for escheating bank accounts from a closed bank. On October 1, 1941, the Attorney General filed a motion in the Court of Appeals to advise that Court of the enactment of the new statute, but the Court of Appeals took no cognizance thereof. (R. 194-217)

On April 12, 1938, the then attorney General of the State of Michigan filed a petition for declaratory judgment relief against the Receiver of the bank, seeking a determination that the then existing escheat statutes were applicable to the insolvent First National Bank-Detroit. At the time of said filing, the Attorney General alleged that there were individual dormant accounts in said bank, totalling approximately $1,799,000. (R. 49)

Of this amount, approximately $483,000.00 may be

eliminated since it represented accounts which were claimed and/or held by the Receiver as offsets for indebtedness due from the owners thereof to the bank. There were likewise included in this total approximately $325,000.00 in accounts representing outstanding negotiable instruments of issue, such as Cashier's Checks, Certified Checks, Certificates of Deposit, Drafts on correspondent banks, et cetera. In addition thereto there were included within the scope of the Attorney General's petition a large number of dormant accounts of other than natural persons, such as partnerships, corporations and associations. (R. 49; 58-59)

For the purpose of trial in the District Court, the respondent Receiver made a further analysis of the inactive savings accounts, aging them upon the basis of inactivity. It developed therefrom that out of a total of 91,196 individual savings accounts, totalling $664,129.38, involved herein, only 331 accounts, totalling $13,642.75, had been inactive for seven years prior to the suspension of the bank on February 11, 1933. (R. 98-99)

The case was tried in the United States District Court in Detroit upon an agreed written stipulation of facts. The Court, in a written opinion, held the escheat acts applicable to the insolvent First National Bank-Detroit, subject to the limitations that they applied only to those accounts which had been inactive for seven years prior to suspension, and that they applied neither to outstanding negotiable instruments of issue nor to accounts other than those of natural persons. (117-122)

The Attorney General of Michigan appealed from this decision to the United States Circuit Court of Appeals for the Sixth Circuit, and the respondent Receiver

cross-appealed. (R. 130, 133) The Court of Appeals reversed the District Court upon the grounds contended for by the Receiver in his cross-appeal and held that the Michigan escheat acts were tantamount to a forfeiture proceeding and inapplicable to a national banking association under the rule established by this Court in the landmark decision of *First National Bank of San Jose v. California*, 262 U. S. 366 (1922).

II

THE ATTORNEY GENERAL'S PETITION SHOULD BE DENIED BECAUSE THE INSTANT PROCEEDINGS ARE MOOT

The Attorney General in his original petition sought a declaratory judgment interpreting the various acts of the Michigan Legislature above referred to, with the exception of the recently enacted Act 170 of the Public Acts of Michigan for 1941, effective June 16, 1941 (app. 57-74). The trial in both the District Court and in the Court of Appeals involved a judicial declaration of rights under the then existing statutes. (R. 16-17)

After the Court of Appeals had rendered its decision, the State of Michigan enacted a completely new escheat statute, above described, which by the very terms of its preamble amends portions of the existing escheat statutes, repeals other portions of said acts, and adds new sections thereto. This act contains no saving clause as to pending litigation. (R. 200) Accordingly, even if this Court should grant certiorari and reverse the decision of the Court of Appeals, it would be impossible for the petitioner to proceed to escheat deposit balances in the First National Bank-Detroit under the statutes presented for determination in the Attorney General's

original petition. No demand has ever been made upon the respondent by the Attorney General to comply with the new act. Respondent therefore submits that with the passage of this new act, the instant litigation has become moot, both as to the old acts and as to the new act.

Borchard in his work on *Declaratory Judgments* (page 60) defines a moot case, *inter alia*, as one brought about "by alteration in the circumstances of the parties or subject matter, so as to make the judgment not decisive or controlling of acts and contested rights, but a pronouncement having academic interest only." To the same effect see the decisions of this Court in *United States v. Alaska Steamship Co.*, 253 U. S. 113, 116 (1920); *Gibbes v. Zimmerman*, 290 U. S. 326 (1933); *Berry v. Davis*, 242 U. S. 468, 470 (1917).

In view of the passage of the new act, any decision of this Court interpreting the old act would be useless and meaningless. To decide this litigation under the new act would be improper both because the new statute was enacted after the time of the filing of the petition for declaratory judgment by the Attorney General, and also because there is at present no "actual controversy" pending as to said new act.

This Court has repeatedly held that there must be an "actual controversy" in order to invoke the jurisdiction of the federal courts under the Federal Declaratory Judgment Act, and that this Court will not render advisory opinions. See *Aetna Life Insurance Company v. Haworth*, 300 U. S. 227, 239, 240 (1937); *Maryland Casualty Company v. Pacific Oil & Coal Company*, 85 L. Ed. Adv. Op. 455, 457 (1941).

Petitioner alleges that the new act, being remedial in nature, may be considered by this Court up to the time of final opinion. Respondent's answer to this contention is two-fold: First, that the rule contended for by the Attorney General does not apply in suits for declaratory judgment, and second, that the statute is not remedial, but is substantive in character.

We have already discussed the first of these points to the effect that no "actual controversy" exists at the present time as to Act 170 of the Public Acts of Michigan for 1941 (app. 57-74). As to the second of these points, we shall not take time to go through the new act section by section, but merely call the Court's attention to a few of the sections therein which are substantive and not remedial in nature.

Section 4 (b) seeks to include within the definition of escheatable property, that belonging to other than natural persons.

Paragraph 2 of Section 9 (a), which we quote verbatim herein, seeks, by legislative fiat, to overrule and reverse the effect of the decision of the Court of Appeals in the instant case:

> "The attorney general shall have the right and be permitted to file 1 or more claims with the receiver, trustee, custodian or liquidating agent of such depository, which shall be allowed or disallowed the same as if filed by the depositor, and subject to the same set-offs. Such claim or claims filed by the attorney general shall cover and include all deposits for which no claims have been filed by the depositor or depositors, and may be

filed at any time before payment of final dividend. Dividends shall be paid to the state board of escheats on all claims so filed by the attorney general, and allowed."

Section 13a (which incidently appears to be a pure forfeiture provision) provides that a depositor shall be presumed to have abandoned property with which he has had no dealing for seven years, and that said property shall escheat to the state without any further proof upon the part of the state.

Section 23 sets forth an innovation with respect to the escheating of negotiable instruments of issue.

Actually, Act 170 presents a new code for escheatage of dormant bank accounts to the State of Michigan. No demand has been made upon the respondent by the petitioner to comply therewith. The respondent therefore submits that it would be improper for this Court to pass upon this new act at this time, that the case as to the old statutes is moot, and that therefore the Attorney General's petition should be denied.

III

RIGHTS OF DEPOSITORS AND CREDITORS OF AN INSOLVENT NATIONAL BANK ARE FIXED AS OF THE DATE OF SUSPENSION AND CANNOT BE AFFECTED BY SUBSEQUENT STATE LEGISLATION.

It is fundamental law relating to the liquidation of an insolvent national bank that all claims against it must be liquidated and determined as of the date of suspension, and that nothing done subsequent to the

date of suspension can affect, alter, or create a claim against an insolvent national bank. Two leading decisions of this Court establish this principle. *White v. Knox,* 111 U. S. 784 (1884); *Merrill v. National Bank of Jacksonville,* 173 U. S. 131, 143 (1899).

Both Acts 45 and 171 of the Public Acts of Michigan for 1933 (app. 50, 52) were passed subsequent to the suspension of the First National Bank-Detroit. The Attorney General clearly alleges in his petition that he seeks a declaration that these acts are applicable to the respondent. (R. 17) It is equally clear that since the rights of creditors and depositors are fixed as of the date of suspension, the State of Michigan cannot at this time attempt to apply as against said First National Bank-Detroit, acts passed subsequent to its closing. In this, there is nothing new or startling; it is but the application of a long and well-established rule of law.

IV

NO NEW QUESTION IS PRESENTED BY THE PETITIONER

The decision of the Court of Appeals is in conflict with neither the decision of any other Circuit Court of Appeals nor with the decisions of the Supreme Court of Michiagn. It is directly in harmony with the long-established law of the land as heretofore announced by this Court in the case of *First National Bank of San Jose v. California,* 262 U. S. 366 (1922).

The two decisions of the Ninth Circuit Court of Appeals urged as being in conflict with the decision below, to-wit, *Territory of Alaska v. First National Bank of*

Fairbanks, 22 Fed. (2d) 377 (1927), and *Territory of Alaska vs. First National Bank of Fairbanks,* 41 Fed. (2d) 186 (1930), are clearly distinguishable.

The Alaska cases upheld the validity of escheating dormant deposit balances under an orthodox escheat statute, which required that it be established by satisfactory proof that the depositor died intestate and without heirs. Judge Dietrich, speaking for the court in the first of the Alaska cases, stated this very clearly on page 379 of the opinion, when he said:

> "Section 1, above quoted, defines the scope of the act, and the attorney general cannot disturb any account, or the bank's full control over it, *unless and until, with the information he seeks from the bank, or otherwise, he shall have secured a valid judicial determination that the depositor died intestate, without heirs, in which case the deposit, like other property is subject to escheatment.* In essence the result is the same as where, in the case of an administered estate, the probate court requires the deposit to be delivered to the administrator, and ultimately, upon a finding of no heirs, turns it over to the territory." (Italics ours)

An even stronger indication of the nature of the proof required under the Alaska statutes in order to obtain a judicial determination that the depositor died intestate and without heirs, is presented in the second Alaska case, particularly on page 188 thereof.

The Michigan decision of *Braun v. McPherson,* 277 Mich. 396, 269 N. W. 211 (1936), likewise relied upon

by the petitioner, is neither in conflict with the decision of the Court of Appeals nor with the *San Jose* case, *supra*. *Braun v. McPherson* involved a section of Act 45 of the Public Acts of Michigan for 1933 (app. 51) not in controversy herein and involved a state bank. Hence, it did not and could not consider the questions involved herein, as to whether the escheat acts of Michigan constitute a forfeiture proceeding insofar as a national banking association is concerned, or as to whether they constitute an invasion of a purely federal statutory field, governed by the National Bank Act, and are, therefore, in violation of the Federal Constitution.

As this Court has repeatedly held, the National Bank Act establishes a complete, exclusive, and exhaustive system for liquidating insolvent national banks. *Cook County National Bank v. United States,* 107 U. S. 445 (1883); *Davis v. Elmira Savings Bank,* 161 U. S. 275, 283 (1896).

The so-called escheat acts of Michigans are not true escheat acts. They do not provide for the taking by the state of property where it has been properly and judicially determined that a natural person died intestate, possessing property, and without heirs. To the contrary, they establish a forfeiture proceeding under which mere inactivity of a bank account for seven years is sufficient grounds for the state taking over the property of the owner. Such a procedure is a clear invasion of the field governed by the National Bank Act and is completely covered by the ruling in the *San Jose* case.

V

CLAIMS AGAINST AN INSOLVENT NATIONAL BANK MUST BE DETERMINED SOLELY UNDER THE NATIONAL BANK ACT

The matter of establishing and proving claims against an insolvent national bank is covered completely and exclusively by the National Bank Act. Section 191, Title 12, U. S. C. (app. 75), establishes the grounds for the appointment of a Receiver. Section 192 (app. 75-76) outlines the Receiver's general duties, among which it is provided that "such Receiver shall pay over all money so made to the Treasurer of the United States subject to the order of the Comptroller." Section 193 (app. 76-77) provides for notice to creditors.

Section 194 (app. 77), providing for the distribution of assets in an insolvent national bank, is particularly important, and for that reason we quote it in full:

> From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Section 264 (n) (3) of Title 12, U. S. C. (app. 81-82), provides in part as follows:

> The Comptroller of the Currency may, in his descretion, pay dividends on proved claims at any time after the expiration of the period of advertisement made pursuant to section 193 of this title, and no liability shall attach to the Comptroller of the Currency or to the receiver of any national bank by reason of any such payment for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment."

Under the established custom and practice of the office of the Comptroller of the Currency of the United States in the administration of insolvent national banks, all cash in the hands of the Receiver of an insolvent national bank, and in the hands of the Comptroller of the Currency for said bank, is distributed in the form of a final dividend to those creditors, and only those creditors who have established their claims, either to the satisfaction of the Comptroller of the Currency or by adjudication in a court of competent jurisdiction.

Under this custom and practice, no reserve is set up by the Comptroller of the Currency to satisfy any claims of depositors or creditors which might be asserted after a final dividend is declared and the receivership terminated. If any surplus remains after payment in full to creditors and depositors, then, under Section 197 of Title 12, U. S. C. (app. 77-81), said surplus goes to the shareholders of the bank.

This exclusive statutory system for the liquidation of insolvent national banks has been thoroughly reviewed over the last seventy-five years by this Court. No new

conflict between local law and the National Bank Act is presented herein. The *San Jose* decision is controlling here. Obviously, in determining whether the Michigan statutes constitute an unwarranted invasion of a federal statutory field, similar to that of the California statute in the *San Jose* case, it matters not whether the national bank be solvent or insolvent.

Only those creditors and depositors who have established their claims in compliance with the terms of the National Bank Act are entitled to share ratably in the distribution of the receivership assets. In this, likewise, there is nothing new presented to this Court. It has long been the rule not only in insolvent national bank liquidation, but in insolvency proceedings generally, that those creditors, and only those creditors, who filed claims are entitled to share in the distribution of the insolvent estate. Such is the general rule in bankruptcies, equity receiverships, decedent estates, et cetera.

CONCLUSION

For the reasons above, said respondent respectfully submits that the petitioner has failed to show any valid reasons for the allowance of writs of certiorari in the within case, and that, therefore, the Attorney General's petition should be denied.

Respectfully submitted,

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